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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

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PROOF OF SERVICE

I, Bruce E. Lovett, one of the attorneys for the applicant, National Cable Television Association, Inc. (NCTA) Amicus Curiae, and a member of the bar of this Court, hereby certify that on the 24th day of January, 1968 I served NCTA's "Motion for Permission to File and Brief Amicus Curiae", by mailing copies thereof in a duly addressed envelope with first class postage prepaid, to all parties on whom such

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MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rules 35 and 42(3) of the Rules of this Court, National Cable Television Association, Inc., (NCTA) respectfully moves the Court to grant NCTA permission to file a Brief *Amicus Curiae* herein on the following grounds:

1. NCTA has requested permission of both parties herein to file a Brief *Amicus Curiae* in support of Petitioner. On October 4, 1967, Respondent United Artists Television, Inc., refused such permission.

2. On October 16, 1967, National Community Television Association, Inc., (NCTA) filed with the Court a Motion and Brief for Permission to File Brief *Amicus Curiae* in support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The corporate name of National Community Television Association, Inc., has been changed to National Cable Television Association, Inc., and the two are one and the same person.

3. By Order of December 4, 1967, the Court granted the Motion of NCTA and in the same Order granted a Writ of Certiorari in this matter, now pending herein on the merits.

4. NCTA is the only national trade association representing the community antenna or cable television industry, which industry will be directly and substantially affected by the final Opinion in this matter. Accordingly, NCTA is vitally concerned on behalf of its members and the public that this Court have before it a complete analysis and argument covering all phases of the public and private considerations involved in the issues presented.

5. The questions presented, among other things, emphasize conflicts created by the opinions below, between national public policies enunicated in the Copyright Act, the Communications Act and the federal antitrust statutes. As an organization representing a substantial part of the CATV industry, NCTA is particularly qualified to aid the Court from an industry-

wide viewpoint, emphasizing the national impact upon television viewing which could result if a proper resolution of the conflicts between these important public policies is not achieved.

6. NCTA believes that the parties, not representing the broad industry view, will present arguments more narrowly aimed at the effects of the ruling on the parties herein and that, because the result will affect an entire industry, NCTA wishes to inform the Court of the CATV industry's views and of the severe impact of the decision on that industry.

7. The policies contained in the Copyright Act, the Communications Act, and the antitrust statutes have a direct bearing on the extension of copyright monopolies, and may be dispositive of the case.

RESPECTFULLY SUBMITTED, this 24th day of January, 1968.

Bruce E. Lovett
Gary L. Christensen
1634 Eye Street, N.W.
Washington, D.C. 20006
Attorneys for National Cable Television Association, Inc., Amicus Curiae

INTEREST OF AMICUS CURIAE

National Cable Television Association, Inc., incorporated in 1952, is the only national trade organization representing the community antenna television (CATV) industry. It represents 885 CATV systems having 1,407,000 subscriber-homes, which is over 56% of CATV-served homes.[1] Among other trade-association activities, NCTA, in conjunction with eight regional and twenty-one state CATV associations, collects and disseminates information of general interest concerning the CATV industry. NCTA has represented the CATV industry in proceedings in the courts, legislatures, and state and federal agencies on problems of an industry-wide nature, and performs a variety of other services designed to assist its members in promoting the development and public acceptance of CATV service.

The opinions of the lower courts have a direct impact on NCTA, and its members, as well as the public which relies upon CATV systems for adequate television reception. NCTA is therefore vitally concerned with the consequences of the rule announced by the lower courts in this case.

BACKGROUND INFORMATION ABOUT THE CATV INDUSTRY

The first commercial CATV systems commenced operation in the mountainous areas of Pennsylvania in the late 1940's. The number of systems grew rapidly

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[1] Assuming an average of three television viewers per television home, over 4 million television viewers are served by NCTA member systems.

during the early 1950's as a result of the Federal Communications Commission's (hereinafter FCC) "freeze" on the licensing of television stations, which lasted from the fall of 1948 to the spring of 1952. Government[2] and NCTA sources indicate that there are approximately two thousand CATV systems presently operating. Data collected by NCTA indicates there are about 1100 additional systems enfranchised but not yet operating, and about 1600 applications pending before municipal and other local agencies for authority to construct new systems.[3] Operating CATV systems now provide service to approximately eight million television viewers in all 50 states.

CATV developed in small communities and non-urban areas in response to public demand from those who were so disadvantageously situated in relation to television broadcast stations by reason of distance or terrain that they received poor signals or none at all, or could not receive a variety of signals. The service achieved particularly swift public acceptance in mountainous areas of the East, and in the West where communities were widely spaced and television stations infrequent. The industry has been recognized by the F.C.C. as having "arisen in response to public need and demand for improved television service" and as performing "public services in this respect." The Commission made it clear that CATV systems "make

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[2] CATV Operational and Ownership Data—1966, F.C.C. Release No. 605, Public Notice G, November 22, 1967.

[3] Since several applications may be pending in the same municipality it should not be assumed that applications are pending in 1,600 additional communities.

important contributions" to the national television system.[4]

The present structure of the CATV industry is predominantly oriented toward small systems in smaller sized communities.[5] The average system has about 3150 subscribers, and employs three persons in addition to the system owner.

In achieving an understanding of the public service the CATV industry performs, its contribution to the country's educational system, particularly in the rural or non-urban area, should not be overlooked. CATV

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[4] *Second Report and Order on CATV*, 2 F.C.C. 2d 725, 745 (1966); see also N. Johnson, *CATV: Promise and Peril*, Saturday Review, Nov. 11, 1967, pp. 37 et seq.; D. Loehwing, *How Much Interference?*, Barron's, Nov. 13, 1967, pp. 3 et seq.

[5] *Size of City*	*Number of Systems in Cities of this Size Category*	*Number of U.S. Cities in Size Category*
1,000,00 or more	1	5
500,000-1,000,000	5	16
250,000-500,000	1	30
100,000-250,000	15	79
50,000-100,000	66	180
25,000-50,000	131	366
10,000-25,000	314	978
5,000-10,000	327	1,282
2,500-5,000	324	1,763
1,000-2,500	320	3,515
Under 1,000	283	9,874
Total	1,787	18,088

Source: Television Digest's CATV & Station Coverage Atlas, 1967-68 Ed., p. 4a. See also, M. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, a Report to the Federal Communications Commission*, 1965, at p. 1.

systems have become a significant aid to the distribution of the signals of non-commercial educational television stations to homes and schools.[6] CATV systems now distribute the signals of 73% of the nation's educational television stations to 1,318 elementary schools, 295 junior high schools, 323 senior high schools, 29 junior colleges and 39 universities, having over 940,000 students.[7]

QUESTION PRESENTED

The threshold question presented by this appeal is whether reception of the signals of a television station which is broadcasting a copyrighted program pursuant to a license from the copyright owner and the transmission of those signals in the form of electromagnetic energy to the CATV systems' subscribers, where those signals are converted into the sights and sounds of the program by the subscribers by means of their privately owned television receivers, constitute an infringing public "performance" of the copyrighted work within the meaning of Sections 1(c) and (d) of the Copyright Act. (17 U.S.C. Sections 1 (c), (d)). That the operations of a CATV system do not constitute a performance has been carefully briefed by the Petitioner, Fortnightly Corporation, both in the courts below and for this Court. NCTA will not replow this ground. It supports and adopts the brief of Petitioner in this

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[6] Journal of the National Association of Educational Broadcasters, March-April, 1964, p. 46.

[7] *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, U.S. Senate,* 90th Congress, 1st Session, *on the Public Television Act of 1967, S. 1160,* p. 678.

respect. However, it is believed that supplemental comment will be helpful to this Court with regard to the ruling of the Court below that the CATV reception constitutes performance and of the consequences of such a ruling from an industry-wide point of view.

ARGUMENT

I

Achievement of the Objectives and Public Policy of the Copyright Act Does Not Require a Finding That CATV System Operation Constitutes an Infringing Performance

The public policy of the Copyright Act is twofold. Its fundamental purpose is to induce authors, composers and artists to release to the public the product of their creative genius.[8] Reward to the copyright owner, although an important consideration, is secondary to that primary purpose.[9] However, both objectives are met with respect to CATV reception of authorized broadcasts without the extension of the monopoly to CATV. The economics of television broadcasting have functioned well to induce the artists as well as the large corporate copyright holders to release their works to the public through the medium of television broadcasting. As a practical matter, it cannot reasonably be contended that CATV, operating within the framework of the television industry as it has for the past 17 years without paying copyright royalties, has had an adverse

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[8] *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). See *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932).

[9] *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).

impact upon the implementation of the public policies of the Copyright Act.[10]

It is noteworthy in this connection that the television broadcasting industry had income before federal in-

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[10] See the testimony of the Antitrust Division, Department of Justice before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, U.S. Senate, 89th Cong., 2nd Sess. in *Hearings pursuant to S. Res. 201 on S. 1006*, a bill to provide for general revision of the copyright laws, (1966) at 214:

> "In a more practical vein, it is argued that copyright liability for CATV's is needed to provide a basis for compensating the copyright holders, and thus to encourage them to create programs. We note, however, that up to now the television broadcasting industry has had no difficulty in obtaining programing material, and paying for it through the sale of advertising—and this despite the growth of a CATV industry which has not paid copyright royalties and has not been otherwise restricted by copyright holders. Indeed, there is little reason to think that injury to copyright holders should have resulted from CATV expansion. A CATV system increases the number of viewers of a station. Since the advertising sponsors who bear the cost of television programing pay the station a fee which usually increases as the size of the audience grows, the existence of CATV transmission should increase the amount paid by sponsors and this should increase the royalties paid for the programs even though the CATV system itself pays no royalty.
>
> ". . . Finally, while we believe that the factual questions involved in estimating the possibility of disincentive effects on copyright holders are difficult and merit the careful examination and evaluation of the committee, we also believe it probable that in the long run the stations transmitted over CATV should be able to adjust advertising rates, and pay more for programs, according to their new widespread audience. For this reason, allowing CATV systems to retransmit television programs royalty free may not decrease significantly the amount of money paid to copyright holders."

come taxes in 1966, of 492.9 million dollars after deducting from gross income all expenses including over 1 billion dollars in program expenses.[11] In 1960, the year this action was instituted, the television industry had gross revenues in excess of 1.2 billion dollars and income before federal income taxes, after deduction of all other expenses, of $244.1 million.[12] Official figures released by the Federal Communications Commission show continuous and substantial annual increases in income before federal income taxes from 1956 continuing through 1966 (the latest reported year).[13] The spread between income and expenses has been increasing over the years.[14]

It may not be fairly said that subscribers to CATV systems have not made a fair and pro rata contribution to the 2.2 billion dollars of gross income received by the three television networks including their owned stations and the 593 other stations during 1966.[15] This may be clearly demonstrated by the economics of televi-

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[11] TV Broadcast Financial Data—1966, FCC No. 5317, Public Notice, released August 25, 1967, Tables 1 and 8.

[12] *Id.* Table 1.

[13] *Ibid.*

[14] *Id.* Chart, p. 2.

[15] Total time sales by the networks and the 608 television stations (including the network owned-stations) exceeded 1.8 billion dollars in 1966. *Id.* Table 1A, Table 3, lines 5 and 7.

sion broadcasting.[16] The principal source of revenue to finance the television industry is from time sales to advertisers or sponsors.[17] These revenues are used, in part, to defray the cost of acquiring programs.[18] Station and net work rates charged to advertisers are influenced by the size of the station's and network's audiences (circulation) during a given time or program period.[19] A station's network rate (the rate paid by the network for time on the station) is also determined in relation to the size of the station's circulation.[20] Circulation or audience estimates are used in soliciting new business from advertisers and

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[16] The economic system under which television broadcasting operates, as set forth herein, is described in sworn testimony of three top network executives and the President of the National Association of Broadcasters (NAB) in *Hearings on the Use of Ratings in Broadcasting before a Subcomm. of the House Comm. on Interstate and Foreign Commerce,* 88th Cong., 1st Sess. Pt. 1 (1963). The executives were Thomas W. Moore, Vice President in Charge of Television of ABC Television Network at pp. 65-73; Mort Werner, Vice President in Charge of Programs for the NBC Television Network, at pp. 75-138; James T. Aubrey, Jr., President of CBS Television Network at pp. 32-54. The testimony of the President of the NAB (unsworn by oversight), appears at pp. 3-32. Citations to this testimony will be by name of witness and to the page.

[17] *Supra* note 16, Table IB; Aubrey, *supra,* note 16 at pp. 33, 35-6. pp. 35-6.

[18] *Ibid.*

[19] Aubrey, *supra* note 16 at p. 34: "The pricing of network time to advertisers is influenced by audience size. Since potential audiences vary by time of day, varying prices are charged for different time segments of the day."

[20] Aubrey, *Id.* at 34, 36; Moore, *supra* note 16 at p. 68; Werner (Adams), *supra* note 16 at pp. 118-19.

maintaining existing business.[21] Audience estimates are also relied on heavily by advertising agencies in purchasing television time.[22] Advertisers are vitally interested in the size of the audience to which their commercial messages are exposed.[23] Normally, television advertisers seek the largest possible audience or circulation.[24] The most common yardstick which advertisers may use to evaluate their purchases of television time is the cost per thousand of the viewing homes.[25] Thus the entire economic system of television is founded on advertiser payments to the stations and networks and the amount of those payments is geared to the size and composition of the audiences provided.

The audience estimates or circulation used by the stations, the networks and advertisers, are based upon measurements conducted by so-called rating services. There are several organizations providing rating services; however, the two principal ones are A. C. Neilsen

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[21] Aubrey, *Id.* at p. 34; Werner, *Id.* at p. 76. See also p. 81 where Mr. Werner stated:

> "Television is not only a program service but an advertising medium which operates in a framework of intense competition. The principal value television has to offer an advertiser is audience, and the rating services furnish us and our advertisers with the measurement of the audience generated by our programs. This is a business requirement of broadcasting, essential in soliciting and justifying the advertising expenditures that support our program services."

[22] Aubrey, *Id.* at pp. 33-5, 37 (Sparger); Collins, *supra* note 16 at p. 6.

[23] *Id.* at p. 33.

[24] *Id.* at p. 35.

[25] Moore, *supra* note 16 at p. 67.

Company and the American Research Bureau (ARB).[26] The sampling methods and techniques of both of these companies are so designed as to include all television viewers in the audience of the particular television station they are viewing, whether they utilize the services of CATV systems or other master antenna systems, or any other type of antenna. Thus, television viewers utilizing CATV, as part of a station's circulation, influence in the same manner as any other television viewers the station's and network's rates to and income from advertisers and are part of the audience for which the advertiser pays.

The costs of advertising are, of course, included in the cost of the product advertised. To the extent that television viewers succumb to the blandishments of those who advertise on television and purchase the advertised products, they provide the revenue to advertisers which they, in turn, use to purchase time. Members of the public who view their television through connections to CATV systems are subject to the same advertising messages as those who utilize other antennas, and accordingly, in general make the same contribution to the advertiser as other television viewers and, thus pay their share of the revenue available to the station for acquiring program rights. The subscriber to a CATV service—who has paid his share and played his part in the economic system that supports television—should not be required to make a second payment to the copyright proprietor through his CATV subscription. The Department of Justice addressed itself quite specifically to this point in its testimony before the Senate

[26] Testimony of Moore, Aubrey and Werner, *supra* note 16.

Subcommittee on the legislative proposal which would have applied copyright liability to CATV systems.

> "Finally, the CATV liability here proposed would in fact be a departure from the system by which copyright holders are now compensated. Generally speaking, the television viewer in effect now pays for the television programing indirectly, by buying the products of the sponsors, since the sponsors' payments for advertising include royalties for the copyright holders. We do not believe that the television viewer via CATV should in addition, make direct royalty payments to the copyright holder through his CATV subscription and, indeed, think it may be inequitable to require him to do so. To summarize, it is far from clear that the case for the blanket copyright liability has been made in terms of its necessity as an incentive to creation, and some inequitable treatment of CATV viewers may well result. *For these reasons, we do not believe that copyright policy necessitates the proposal here made.*" (Emphasis supplied.) *Hearings on S. 1006, supra* note 10, at 214-15.

II

A Judicial Holding That Reception and Transmission by CATV Systems of Television Broadcast Signals Constitutes a Performance Would Apply Equally to All Master Antenna Systems, Including the Well-Known Apartment House Systems in Use Throughout the United States

If, in fact, the Petitioner's CATV systems "perform" in providing antenna services to their subscribers, then all apartment house owners utilizing master antenna systems to serve the tenants and residents of those apartments, are likewise and equally engaged in "performing" copyrighted works. That CATV systems are technically and functionally anal-

ogous to master antenna systems used in apartment houses is a fact supported by decisions of the courts and by the record herein. In fact, community antenna equipment was originally adapted from master antenna systems used in dealers' show rooms and apartment houses. This technical relationship was explored at length and findings of fact confirming the relationship were made by the U. S. District Court for the Eastern District of Pennsylvania in 1960.[27] There being no functional or material technical distinction between CATV systems and master antennas commonly used in apartment houses throughout the United States, it follows that if a CATV system performs under Sections 1(c) and (d), then all apartment house and master antennas perform in the same manner. Since such systems produce a financial or commercial advantage to apartment house owners the alleged "performances" would be for profit. Nothing in the decisions of the courts below allows for an exception for such master antenna systems and the facts permit no valid distinction. If the decision below is affirmed, any apartment house owner who provides a master antenna service for the convenience of his tenants would be an infringer subject to the same liabilities as a CATV operator and the costs of copyright royalties and negotiating clearances obviously would be passed on to the tenants in the form of rent or special fees, or in the alternative, the

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[27] *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960) *aff'd per curiam*, 365 U.S. 567 (1961); *cf. Lilly* v. *United States*, 238 F.2d 584 (4 Cir. 1956) and *Pahoulis* v. *United States*, 242 F.2d 345 (3 Cir. 1957). The Petitioners's equipment and the systems were built by Jerrold.

antenna service would be discounted.[28] The Copyright Act could never have been intended to and should not be construed to produce such absurd consequences.

Reception and transmission of electromagnetic energy (broadcast signals) rationally cannot be and is not, in and of itself, a "performance" within any reasonable construction of the word as a matter of simple English or as a word of art. The results of such a forced construction of "performance" are far-reaching, incongruous and create an unwarranted discrimination between persons residing in the same area who desire to use master antennas and those using individual antennas.

III

A Blanket Application of the Copyright Monopoly to Reception by CATV Systems Would Have Serious Anticompetitive Consequences One of Which Would Be To Transfer Ownership and Control of the Industry to the Large Corporate Copyright Owners

Neither the language of the Copyright Act nor anything in its legislative history requires the interpretation of "performance" reached by the courts below.[29] Accordingly, in determining whether the Court should uphold a judicial application of the copyright monopoly

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[28] It cannot be assumed that copyright proprietors would voluntarily waive royalties from apartment house services. Large apartment complexes in major cities may have more tenants than some CATV systems have subscribers.

[29] Opinion of Court of Appeals (Appendix to the Record herein, 1343-67); 377 F.2d at 876. The District Court also recognized that the word "performance" in its ordinary sense does not include CATV reception. (Appendix 67), 255 F. Supp. at 201.

to CATV reception, it is appropriate to consider public policies arising under other federal statutes. Since the national public policy is opposed to monopoly, the anticompetitive consequences of a judicial extension of the copyright monopoly warrant careful consideration. They are such in this case as to require a conclusion by this Court that the monopoly not encompass CATV activity.

The United States Department of Justice has taken the position in testimony presented before a Senate Subcommittee on a bill providing for general revision of the Copyright Act that a legislative extension of blanket copyright liability to CATV would have serious anticompetitive consequences.[30] The views of the Department have been quoted by Petitioner. NCTA supports the position taken by Petitioner, but believes that it can assist the Court in evaluating the anticompetitive risks of affirming the rule announced by the court below by analysis of some CATV industry statistics recently released by the Federal Communications Commission. Relation of these statistics to obvious economic facts about the CATV industry and to the recognized problems of clearing licenses for CATV will demonstrate that the only manner in which the reception service provided by CATV and other master antenna systems could survive a blanket application of the copyright monopoly to such operations would either be to surrender ownership and control to the large copyright proprietors or to negotiate for overall clearances with a now nonexistent organization which would

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[30] *Supra* note 10 at 211-15.

have to be established to represent all copyrights on television.

The F.C.C. recently released a compilation of CATV Operational and Ownership Data—1966, based upon returns of F.C.C. Form 325, filed by 2246 CATV systems. This represents a substantial majority of operating CATV systems. Approximately one-half of these systems have less than 500 subscribers; in excess of 60% have less than 1,000 subscribers.[30a] If it be assumed that the monthly charge of each system is $5.00,[31] a system having 1,000 subscribers has $5,000 per month or $60,000 per year to pay all usual operating expenses, to amortize equipment costs and loans, as well as to cover the costs of negotiating clearances with copyright owners and to pay the copyright fees, unless charges to subscribers are raised.

Considering that the CATV operator must deal with the major networks and the major film syndicators and distributors, this is little to work with. While we do not know how many owners of copyrighted television programs there are, the number must be very substantial. Mr. Arthur B. Krim, President of United Artists Corporation, Respondent's parent, testified in hearings before a House Subcommittee on general revision of the copyright law that he spoke there on behalf of 14 major companies which represented 75%

[30a] *Supra* note 2, Chart 3.

[31] The records of NCTA indicate a range of monthly charges from $3.50 to $8.00. The monthly rate for the majority of systems ranges between $4.50 and $5.00. The record shows that the Petitioner's monthly charge was $3.75.

of "the copyrighted material on the airwaves today." [32] He estimated that another 14 might represent 100% of such material. We doubt this and believe the figure to be much higher. In any event, the CATV operator would have to bargain with 25 or more major syndicators and three television networks, not to mention the music performing societies such as ASCAP, BMI and SESAC, Inc.[33] Moreover, he would have to be alert to the possibility of occasional broadcasts of programs owned by lesser known or obscure copyright proprietors.

There exists no machinery such as an ASCAP through which the CATV operator may bargain with the numerous copyright proprietors for blanket advance clearances. The system operator can know the copyright proprietors with whom it must bargain no earlier than the stations the system receives choose to announce their program schedules. Thus, the system is subject entirely to the station's schedule for advance warning as to those copyright owners whose permission it would need to obtain. Moreover, since the typical system will receive five different stations,[34] it will have to be concerned with clearances on five different program schedules, and all only after securing information identifying the program suppliers when the stations

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[32] *Hearings on Copyright Law Revision before Subcomm. No. 3 of the House Judiciary Comm.*, 89th Cong., 1st Sess., p. 1332 (1965).

[33] American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and Society of European Stage Authors & Composers, Inc.

[34] Seiden, *supra* note 5 at p. 54.

announce their schedules. The average small system (as well as a large majority of the country's CATV systems) will not be in a position to negotiate advance clearances in time to continue its reception service, even if it had the necessary funds to pay the costs of such last minute negotiations.[35] Thus, as a practical matter if service is to continue, negotiations will usually follow reception and consequent infringement, and the CATV system will have the choice of acceding to the copyright proprietors' demands or litigating damages. Where the claimed statutory damages were large, it is easy to see how the larger copyright proprietors and networks would end up owning the CATV industry.[36]

In addition, it should be noted that a CATV operator does not pick and choose his programs. He is not a

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[35] It is common knowledge that last minute changes occur frequently in television station program schedules. It is manifestly impossible for a CATV operator (since he is not the originator of the broadcasts) to anticipate such program changes and make advance clearances. Thus he is constantly faced with the hazard of innocent infringements and harassing litigation.

[36] Consideration of the enormous potential liability for past damages under the three year statute of limitations also makes it clear that the only manner in which such back liabilities could be discharged would be to turn the systems over to the copyright owners. A five-channel system receiving five stations will receive 1,500 or more programs a week. Assuming that only two-thirds of these are copyrighted, systems would infringe as many as 1,000 programs per week. At statutory damages of $250.00 per infringement, damages for such a system would total $250,000 per week or 1 million dollars per month. This amount will exceed the value of any CATV system. CATV, if only a fraction of these damages were assessed, could continue only if owned and controlled by the networks and the major non-network copyright proprietors.

program originator with the opportunity of negotiating with alternative program sources. He must pay for whatever the station chooses to broadcast, or else eliminate reception of that station's programs. Absent an automatic or compulsory license for CATV established pursuant to legislation, the large majority of systems would not have the capability to bargain and would either have to accept the terms imposed by the copyright proprietors, violate the law or cease operation.

It seems obvious that the CATV industry's only possible solution to the copyright clearance problem, if it is to be brought within the monopoly by judicial rule, is the creation of a new performing rights society (such as ASCAP) which could blockbook and negotiate overall clearances. As has been demonstrated above, independent CATV could not exist if individual clearances on each program had to be negotiated with each separate copyright proprietor. But establishment of such an overall clearance mechanism raises difficult problems under the antitrust laws. *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S.D.N.Y. 1948); *cf. United States* v. *Loew's Inc.,* 371 U.S. 38 (1962). And such a new combination of copyright proprietors would obviously have life-or-death power on CATV, and, unless subject to court control like ASCAP, could easily take over the CATV industry.

The result reached by the courts below produces a situation in which the complete takeover of the CATV industry by the major copyright holders, and particularly the networks, appears probable. Such a concentration of control of production and public access to

copyrighted television programs is comparable to the situation struck down by this Court in the motion picture industry in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

In the face of the severe anticompetitive consequences which will flow from the rule, NCTA submits that the copyright monopoly should not be interpreted to cover a reception service such as CATV unless it is crystal clear that Congress intended such a result.[37]

IV

The Result Reached by the Lower Courts in This Case Will Deprive Many Persons of Television Service to Which They Are Entitled Under the Policies of the Communications Act

The public policy of the Communications Act would be offended and hundreds of communities could be deprived of a large part, if not all, of their television by a blanket extension of the copyright law to cover CATV operation. The public interest in extending the educational and entertainment benefits of television to all of the people of the United States is so obvious as to require no discussion. The Sixth Report and Order of the Federal Communications Commission establishing the Table of Television Channel Allocations throughout the country was founded upon a system of priorities intended to provide television service ". . . as far as possible to all of the people of the United States and to provide a fair, efficient and equitable distribution of television broadcast stations to the

[37] See discussion *supra* p. 16.

several states and communities."[38] Population was a principal consideration bearing on the distribution of assignments, and as a result the larger cities were assigned multiple channels and the smaller cities were limited to one or two channels; many were assigned no channels at all.[39]

It was the inadequacies of these assignments together with the inability of many cities and towns to provide adequate economic support for a television station which were primarily responsible for establishment and growth of the community antenna television industry.[40] The most persuasive evidence of this fact is that 1623, or almost 75% of 2246 systems reporting to F.C.C., are in towns of less than 10,000 people, and more than 50% of the systems reporting have less than

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[38] *Sixth Report & Order on Television Allocations*, 1 Pike & Fischer R.R. (Part 3) 91:620 (1952). The priorities were:

"(1) To provide at least one television *service* to all parts of the United States.

(2) To provide each community with at least one television broadcast *station*.

(3) To provide a choice of at least two television *services* to all parts of the United States.

(4) To provide each community with at least two television broadcast *stations*." (Emphasis supplied)

[39] *Id.* pp. 91:621-25.

[40] M. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, a Report to the Federal Communications Commission*, at 1, 18, 23 (1965).

500 subscribers.[41] CATV systems are the means whereby these communities originally were enabled to enjoy the services of the three national television networks. In more recent years, the programs of non-network and educational stations are also enjoyed by these communities by reason of the service provided by CATV. Thus, the residents of the smaller communities have been enabled to become first class television citizens with the same, or nearly the same, opportunities to enjoy the entertainment benefits of television as the large metropolitan areas.

In this regard, it is instructive to consider the available television in West Virginia, where the petitioner's CATV systems are located. The entire state has only nine operating television stations.[42] Thus the many CATV systems in this state[43] are highly important to

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[41] *Supra* note 2, Charts 2 and 3.

[42] WHIS-TV, Bluefield; WCHS-TV, Charleston-Huntington; WHTN-TV, Huntington-Charleston; WSAZ-TV, Huntington-Charleston; WBOY, Clarksburg; WOAY-TV Oak Hill; WTAP-TV, Parkersburg-Marietta, Ohio; WDTV, Weston-Fairmont; and WTRF-TV, Wheeling, *Television Factbook*, 1967 Ed./No. 37, Stations Volume, pp. 769b-780b.

[43] Data released by the F.C.C. show 92 reporting CATV systems in West Virginia. *CATV Operational and Ownership Data, supra* note 2, Chart 3. However, there are probably many more systems in West Virginia than reported to the F.C.C. Testimony to a House Subcommittee was that "there were more than 40 community antenna systems" in Marion County, with the number of homes using a specific system varying "from less than 50 to thousands." There was also "a cooperative system which has approximately 600 connections." *Hearings on Copyright Law Revision before Subcomm. No. 3 of the House Judiciary Comm.*, 89th Cong., 1st Sess., 1288-1289 (1965). Petitioner's Fairmont system is in Marion County.

the public in the communities in which they operate. Television reception is difficult enough as it is in West Virginia because of the rough terrain, but the communities are small and separated by rough terrain, and probably never could support further stations. Sixty (or two-thirds) of these systems are in towns of less than 500 population and 72 or about 80% are in towns of less than 10,000 people. Sixty-five of the 92 systems have less than 1000 subscribers.[44] Obviously the impact of a blanket extension of copyright liability to these systems as well as larger ones could have a devastating effect upon television in West Virginia. Bearing in mind that approximately 60% of the systems reporting to the F.C.C. have less than one thousand subscribers, the destructive impact of imposing blanket copyright liability on the CATV industry would be felt nationwide.

It is no answer for the copyright proprietors to say they would be reasonable with these systems. The amount of the royalty to be charged is only part of the problem. As has been discussed above, these systems simply are not equipped financially or otherwise to negotiate clearances with 25 to 30 major copyright owners and the three networks for five or more program schedules being received in advance of broadcast and reception. Moreover, if CATV reception is infringing, many copyright owners may be unable to license substantial numbers of their programs to CATV (even if they were willing to do so at reasonable prices) because of having granted exclusive licenses for long

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[44] *Supra* note 2, Charts 1 and 3.

terms to nearby stations[45] and because of the probability that CATV rights may not have been cleared with many artists and performers by the owners of the television rights.

The right of the public to receive television broadcasts for enjoyment in their homes once the broadcast occurs is secured by the Communications Act[46] and it is the policy of that Act to secure the benefits of television for all of the people of the United States. This highly important public policy should be given great weight in determining whether the copyright monopoly should be applied in such a manner that service to thousands of viewers in hundreds of rural communities throughout the nation might be destroyed or at the least seriously disrupted.

CONCLUSION

Clearly, the language, legislative history, and underlying purpose of the Copyright Act do not compel the imposition of copyright liability on CATV system operators. The absence of compelling reasons, together with the demonstrable conflicts between imposition of copyright liability on CATV system operators and the fundamental policies of the Copyright Act, the Communications Act, and the antitrust statutes, in the light

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[45] Since television stations' audiences are much larger than the number of the CATV system's subscribers, the stations can afford to pay more than the CATV system for programs, and through exclusivity contracts could eliminate any CATV reception of programs which have to be licensed by the copyright owner to the station.

[46] 47 U.S.C. § 153(o).

of the disastrous effects upon the CATV industry and the public, require that the decisions below be reversed.

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